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Political Control of Administrative Action : Accountability or Window Dressing ?

Kenneth KERNAGHAN *

A longstanding but increasingly important challenge to democratic governments is the reconciliation of administrative power and administrative responsibility. Thus, political scientists share the concern of law teachers about the means by which administrative action may be directed and constrained.

The major thesis of my paper is that social scientists have construed too narrowly the issue of political control over administrative action in that they have tended 1) to focus on the value of accountability to the neglect of other values and 2) to focus on the role of political executives and legislators to the neglect of other actors on the political stage. In my paper, I will deal first with some problems of definition related to the topic under discussion and will then assess the nature of political controls and influences over administrative action, with particular reference to regulatory agencies.

Definitions **

First, the word *control* is variously interpreted but usually refers to a form of power in which authority of a legal or hierarchical nature is exercised. There is, however, another form of power, namely *influence*, by which one person affects the behaviour of another through such means as persuasion, suggestion and pressure. Thus, power may usefully be viewed as the sum of control and influence. And a reconciliation of administrative power and administrative responsibility is achieved through the exercise of control *and* influence over administrative action.

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** For elaboration on the definitions used in this section, see my article entitled "Responsible Public Bureaucracy: A Rationale and a Framework for Analysis", (1973) 16 *Canadian Public Administration*, pp. 572-603.

Secondly, it is important to emphasize *political influence* as well as political control over administrative action. Political control connotes the use of cabinet, ministerial and legislative authority. However, both ministers and legislators can exercise power over administrative action without resorting to authority enshrined in constitutional or statutory form — that is, they can exercise influence as well as control. It is more important still to recognize that in addition to ministers and legislators, a number of other actors (e.g. the news media, pressure group representatives, individual citizens) play a significant role in the political process. These participants exercise influence rather than control over administrative action. It is clear therefore that a wide range of actors in the political process, both within and outside government, exercise power over administrative action in the form of control and influence.

Thirdly, I understand *administrative action* to refer to the administrator's role in both policy development and policy execution — that is, in the exercise of administrative discretion both in recommending alternative courses of action and in taking decisions under delegated legislative authority.

Finally, the term *accountability* connotes a formal reporting relationship that does not take into consideration the role of participants in the political process who exercise power only in the form of influence and who have no authority to demand an accounting. Moreover, one of the major reasons why political control often amounts to window dressing rather than accountability is that accountability is frequently not the primary value pursued by central actors in the political process. Such values as equity, efficiency and responsiveness often compete with accountability for acceptance in the government market place. All these values are traditionally associated with and may be subsumed under the concept of administrative responsibility. This broad concept is analytically more useful than accountability in providing a complete and comprehensible explanation of the forces affecting administrative action. Use of the concept of administrative responsibility permits recognition of the power exercised over government employees by a wide variety of participants in the political process, and of the significance of values other than accountability.

These distinctions between control and influence and between accountability and responsibility are central to subsequent discussion which will focus on the means by which the many participants in the political process may control and influence administrative action, whether in regular government departments or in agencies, boards and commissions.

Political Control and Influence

Much has already been written by political scientists about the means by which administrative activities in regular government departments may be directed and constrained. Comparatively little attention has been paid to the many non-departmental, semi-autonomous bodies which vary greatly in their organizational form and in their relationships with government. Two important and distinguishable groups of agencies among these diverse entities are crown corporations and regulatory commissions. I propose to delimit the scope of my remarks by making only brief reference to departments and by focussing on government agencies in general and on regulatory commissions in particular.

Despite the emphasis in this paper on government agencies, it would be useful to identify and evaluate the means by which government departments are controlled and influenced as a basis for assessing the extent to which such means are or could be applied to agencies.

Since Mr. Trudeau came to power in 1968, he has made a determined effort to shape and utilize policy-making structures to strengthen the decision-making capacity of Cabinet ministers and so to reduce reliance on the policy advice of public servants. To this end, the Cabinet committee system has been revised; the Prime Minister's Office and the Privy Council Office have been strengthened as coordinating and advisory mechanisms; and alternate sources of policy advice have been tapped through the increased use of such devices as task forces, advisory boards and white papers. There has therefore, been a diffusion of advice and influence on policy development. At the same time as this apparent decline in the advisory powers of public servants has occurred, the expansion in the scope and complexity of government operations has tended to increase the discretionary powers of departmental public servants in the implementation of government policies and programs.

The effort to enhance the control of political executives over the bureaucracy has not been matched by a corresponding increase in the capacity of the legislature to influence administrative action through surveillance and scrutiny of government policies and their implementation. Members of Parliament influence public servants indirectly through questions and debates but potentially the most effective means by which legislators may influence administrative action is through direct contact and confrontation with public servants in parliamentary committees. Despite the reform of the committee

system during the last decade, legislators still lack the expertise and research resources to question public servants effectively. Recent research by Robert Presthus indicates that public servants do not feel significantly influenced by Parliament as compared to government (the Cabinet and ministers), interest groups and their perception of the public interest.

The accountability of public servants to Parliament is theoretically ensured by the doctrine of ministerial responsibility according to which a minister is responsible to Parliament for the acts of his administrative subordinates. It is generally acknowledged of course that a minister cannot in practice be reasonably expected to have knowledge of and to bear personal responsibility for all the activities of his departmental subordinates.

It is not surprising therefore that ministers are reluctant to be held responsible for the administrative activities of such *non-departmental* bodies as crown corporations and regulatory agencies. Indeed, many of these were established with semi-autonomous status in part to free them from political (e.g. executive and legislative) control and influence and to free ministers from answering to Parliament for the operations of these bodies. All these entities report annually to Parliament through a designated minister. The conventional theory and the usual practice, however, is that the designated minister answers to Parliament for the overall policy under which an agency operates but refuses to answer for the day-to-day operations of the agency for which the agency itself is responsible.

The act constituting an agency provides for its structure and for the general policy objectives it is expected to pursue. This constituent act and other statutes bearing on an agency's responsibilities set out the various means by which a minister or the cabinet may control the agency. Among the primary means of control are a directive power which a minister or the cabinet may use to direct an agency to follow a specific course of action; the power of a minister or the cabinet to approve an agency's regulations and by-laws; controls over the operating and/or capital budgets of certain agencies; and powers of appointment and dismissal of agency heads and members.

Although these powers appear to give ministers the potential for effective control over agencies, some ministers make little use of these control mechanisms. For example, some ministers may be reluctant to utilize their directive power because they thereby become responsible for the agency's action — to their possible political disadvantage. Other ministers prefer to *influence* an agency's activities through informal consultation and the exchange of information. This is an attractive approach for a minister who wishes formal accountability to

remain with the agency. Still other ministers feel that they simply do not have adequate instruments of control over government agencies.

The separation which ministers maintain between responsibility for general policy as opposed to day-to-day management of an agency often frustrates the efforts of legislators to achieve greater public accountability of government agencies. This frustration is experienced both on the floor of the House of Commons and in parliamentary committees and is increased by agency heads who insist on their independence from political "interference" with their agency's operations. For example, the President of the CBC recently informed the Commons broadcasting committee that he would listen to complaints about CBC programs and policies but would not stand for "political direction" over the CBC. He said that he had confidence in his own ability "to distinguish between the proper expression of MPs' concerns about the CBC and any attempt to bring to bear political influence or direction upon our programming".

Although the Trudeau government has enhanced the capability of political executives and, to a lesser extent, legislators to control and influence administrative action in departments, little has been done to facilitate more effective control over agencies.

The Regulatory Process

On the basis of these observations on control and influence over administrative action in departments and agencies in general, I want now to centre attention on regulatory agencies. The reasons for this focus are that political scientists in Canada have done little research and writing on regulatory agencies and these agencies pose perhaps the most formidable challenge to effective political control and influence. Crown corporations are a large and important group of agencies but it appears that the present relationship of crown corporations to government will be significantly altered by legislation in the very near future.

Concern with regulatory agencies is justified also by the fact that the regulatory process is in very large part a political process. Regulatory agencies are involved in politics in the sense of the authoritative allocation of society's resources. The agencies contribute significantly to the development and implementation of public policy through their discretionary powers to make decisions in particular cases and to interpret the very general policy guidelines contained in their constituent acts. Some agencies contribute directly to policy

formation by providing advice to the government in the policy field for which they have regulatory responsibilities.

An assessment of the means available to check administrative action in regulatory agencies demonstrates the independence these agencies enjoy as compared to government departments. Since the agencies are much less constrained than departments by the Prime Minister's Office, the Privy Council Office and the Treasury Board, the direct control of regulatory behaviour by political executives and legislators is very important. Yet we have already seen that the Cabinet, Cabinet Ministers and Members of Parliament exercise less control — and influence — over regulatory agencies than over departments. Among the means that have been suggested to promote greater accountability of these agencies to the government and Parliament are more extensive use of the ministerial directive power; the provision of more specific policy guidelines in the constituent act and the regular updating of these guidelines to accord with changing government policy; more frequent informal consultation between agencies and the minister to promote coordination of agency operations with government policy; and improving the capacity of parliamentary committees to oversee and scrutinize agency operations.

The difficulty of achieving accountability through political control by ministers and legislators makes the role of other participants in the regulatory process comparatively more important. Such participants as representatives of regulated industries, of interest groups and of the news media cannot control regulatory behaviour by exercising legal or hierarchical authority over agencies. They can, however, *influence* agency decisions through various forms of pressure and publicity. Although they may exercise this influence to attain greater accountability of regulatory agencies, they may also seek responsible regulatory behaviour through the pursuit of such values as equity, efficiency and responsiveness. These values often clash with one another and with accountability as bases for agency decisions. Agencies are subject to the expectations of a variety of participants in the regulatory process and are obliged to reconcile the competing values pursued by these participants (e.g. accountability v. responsiveness or efficiency v. equity).

Responsible regulatory behaviour increasingly requires that agencies respond not only to the expectations of the regulated industries but also to those of the many organizations, groups and individuals affected less directly by regulatory decisions. These participants in the regulatory process compete with the regulated industries for the ear — and the sympathy — of agency members. The regulated industries strive to influence the decision-making behaviour

of regulatory agencies both through formal channels and through informal, personal contacts. Industry representatives also interact with the various other players in the regulatory arena with a view to winning support for or minimizing opposition to their objectives.

In terms of the major values mentioned earlier, the regulated industries tend to be primarily concerned with responsiveness and equity, but in a specific and narrow sense of these words. The regulatory agencies are perceived as responsive if they are attuned to the needs and requests of the regulated. And equity is interpreted as fair and just treatment of the regulated by the regulators.

Recently, the activities of regulatory bodies have become a matter of more widespread public concern and the values of responsiveness and equity are now more broadly interpreted by both politicians and the general public. Responsiveness involves sensitivity to the range of interests affected both directly and *indirectly* by agency regulation of industry. And equity connotes fair and just treatment among these interests. The pursuit of these values is accompanied by more active concern with the accountability of the regulatory agencies to political and judicial authorities. These values are actively articulated and pursued by environmental, consumer and public-interest groups. Regulatory agencies are being encouraged to view the public interest less in terms of the efficient regulation of an industry and more in terms of the broad social and economic impact of their decisions on the general public. Similarly, the regulated industries have been forced into a more defensive posture in their relations with regulators and into efforts to demonstrate that their objectives are in accordance with the public interest.

Thus, political executives and legislators who pursue accountability through political control over administrative action must take more account of the influence of other political actors and of other values in the regulatory sphere. Aside from industry representatives, these actors tend to favour greater control by political executives and legislators because elected representatives are more likely than agency members to see the general welfare and are therefore less likely to be captured by the regulated industries.

In view of the impact on the decisions of regulatory agencies of those with whom they interact, *access* to regulators on both a formal and informal basis is of central importance to all participants in the regulatory process. Thus, the expansion of formal interventions in regulatory proceedings and increased lobbying by consumer and public interest groups is a very significant new element in the regulatory sphere. It seems probably also that effective participation in the regulatory process of a wider range of interests will require freer

access not only to agency members and their staff but also to the information on which their decisions are based.

I anticipate that life will become more difficult and more complicated for the regulatory agencies. They are likely to be subjected to closer political *control*, especially by ministers, and to increased political *influence* by other participants in the regulatory process. The administrative action of regulatory agencies will therefore be characterized by greater accountability to elected representatives, responsiveness to a broader range of interests in society, and more equitable treatment of these interests. The present level of efficiency in regulatory agencies may, however, be adversely affected by the need to base their decisions not only on economic criteria but on political and social considerations as well.